Supreme Court, U.S.
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No. 06-1381

In the Supreme Court of the United States

OMAR MEJIA-HUERTA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Federal Rule of Criminal Procedure 32 requires a district court to give the parties advance notice before imposing a sentence outside the applicable advisory Sentencing Guidelines range based on the criteria set forth in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004), when the grounds for the non-Guidelines sentence are not identified in the presentence report or the parties' prehearing submissions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 480 F.3d 713.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2007. The petition for a writ of certiorari was filed on April 18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in separate proceedings before the same district judge in the United States District Court for the Northern District of Texas, petitioners were convicted of various immigration and firearms offenses and were sentenced to terms of imprisonment ranging from 36 to 120 months. In a consolidated ap-

peal, the court of appeals affirmed the sentences imposed by the district court. Pet. App. 1a-18a.

1. Petitioners Mejia-Huerta, Pantoja-Arellano, Dehuma-Suarez, and Cruz-Martinez were each convicted of illegally reentering the United States after being deported, in violation of 8 U.S.C. 1326. Pet. App. 4a-7a. Petitioner Estrada was convicted of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(1)(A)(ii). Pet. App. 8a. Petitioner Craddock was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 9a.

2. Between December 2005 and February 2006, petitioners were sentenced by the same district judge in the United States District Court for the Northern District of Texas. Pet. App. 48a-76a. In each instance, the court imposed a prison term exceeding the applicable advisory Sentencing Guidelines range based on the criteria set forth in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). Pet. App. 4a-9a. In addition, in each instance, the grounds for the non-Guidelines sentence were not identified in the presentence report or the parties' prehearing submissions. *Ibid.*

a. Petitioner Mejia-Huerta was sentenced in December 2005. Pet. App. 67a. Although his advisory Guidelines range was 9 to 15 months of imprisonment, the district court—without notice to the parties—sentenced him to 36 months of imprisonment, to be followed by three years of supervised release. *Id.* at 4a. The court stated that the variance from the Guidelines sentence was based on Mejia-Huerta's disrespect for the laws of the United States, his long criminal history, and the danger he poses to United States citizens. *Ibid.*; Mejia-Huerta Sent. Tr. 5-6. Mejia-Huerta did not object to the

lack of notice or to the sentence, *id.* at 6-7, but he timely filed a notice of appeal. Pet. App. 4a.

b. Petitioner Pantoja-Arellano was sentenced in December 2005. Pet. App. 43a. Although his advisory Guidelines range was 33 to 41 months of imprisonment, the district court—without notice to the parties—sentenced him to 96 months of imprisonment, to be followed by three years of supervised release. *Id.* at 5a. The court stated that the variance was based on Pantoja-Arellano's disrespect for the laws of the United States, his long criminal history, and the danger he poses to United States citizens. *Ibid.*; Pantoja-Arellano Sent. Tr. 5-6. Pantoja-Arellano objected orally to the sentence, *id.* at 7, and he later filed a written objection in which he argued that the court had erred in failing to give him notice under Federal Rule of Criminal Procedure 32(h) of its intent to vary from the advisory range. Pet. App. 5a, 21a. In overruling that objection, the court noted that it would impose the "same sentence" even if it "were to vacate its prior sentence and formally notify the parties in writing that the sentence imposed may be outside of the guideline range." *Id.* at 23a. Pantoja-Arellano timely filed a notice of appeal. *Id.* at 5a.

c. Petitioner Dehuma-Suarez was sentenced in December 2005. Pet. App. 54a. Although his advisory Guidelines range was 21 to 27 months of imprisonment, the district court—without notice to the parties—sentenced him to 120 months of imprisonment, to be followed by three years of supervised release. *Id.* at 6a. The court stated that the variance was based on Dehuma-Suarez's disrespect for the laws of the United States, his long and violent criminal history, and the danger he poses to United States citizens. *Ibid.*; Dehuma-Suarez Sent. Tr. 4-5. Dehuma-Suarez did not

object during the sentencing hearing, *id.* at 5-6, but he later filed a written objection in which he argued that the court had erred in failing to give him notice under Rule 32(h) of its intent to vary from the advisory range. Pet. App. 6a, 35a. In overruling that objection, the court noted that it would impose the "same sentence" even if it "were to vacate its prior sentence and formally notify the parties in writing that the sentence imposed may be outside of the guideline range." *Id.* at 40a. Dehuma-Suarez timely filed a notice of appeal. *Id.* at 6a.

d. Petitioner Cruz-Martinez was sentenced in January 2006. Pet. App. 49a. Although his advisory Guidelines range was 21 to 27 months of imprisonment, the district court—without notice to the parties—sentenced him to 60 months of imprisonment, to be followed by three years of supervised release. *Id.* at 7a. The court stated that the variance was based on Cruz-Martinez's disrespect for the laws of the United States, his long and violent criminal history, and the danger he poses to United States citizens. *Ibid.*; Cruz-Martinez Sent. Tr. 4-6. Cruz-Martinez objected orally to the sentence, *id.* at 6-7, and he later filed a written objection in which he argued that the court had erred in failing to give him notice under Rule 32(h) of its intent to vary from the advisory range. Pet. App. 7a, 26a. In overruling that objection, the court noted that it would impose the "same sentence" even if it "were to vacate its prior sentence and formally notify the parties in writing that the sentence imposed may be outside of the Guidelines range." *Id.* at 31a. Cruz-Martinez timely filed a notice of appeal. *Id.* at 8a.

e. Petitioner Estrada was sentenced in January 2006. Pet. App. 60a. Although his advisory Guidelines range was 27 to 33 months of imprisonment, the district

court—without notice to the parties—sentenced him to 41 months of imprisonment, to be followed by three years of supervised release. *Id.* at 8a. The court stated that the variance was based on Estrada's disrespect for the laws of the United States, the danger he poses to the public, and the fact that he was involved in the transportation of 27 illegal aliens. Estrada Sent. Tr. 7-8. At the conclusion of the sentencing hearing, Estrada stated that he would "file a written objection on the notice requirement," *id.* at 9, but he did not elaborate any further, and he did not ever file any written objection. He did, however, timely file a notice of appeal. Pet. App. 8a.

f. Petitioner Craddock was sentenced in February 2006. Pet. App. 72a. Although his advisory Guidelines range was 21 to 27 months of imprisonment, the district court—without notice to the parties—sentenced him to 60 months of imprisonment, to be followed by three years of supervised release. *Id.* at 9a. The court stated that the variance was based on Craddock's especially "violent and assaultive background" and the danger he poses to the public. Craddock Sent. Tr. 5-7. Craddock did not object to the lack of notice or to the sentence, *id.* at 8, but he timely filed a notice of appeal. Pet. App. 9a.

3. In a consolidated appeal, petitioners argued that, under Rule 32(h) and *Burns* v. *United States*, 501 U.S. 129 (1991), they were entitled to reasonable notice that the district court was contemplating a sentence above the applicable advisory Guidelines range. Pet. C.A. Br. 8-16. The government agreed that the district court had "erred in not giving [petitioners] advance notice of its intention to impose a sentence above the advisory guideline range" in each instance, Gov't C.A. Br. 13; *id.* at 16-18, but the government argued that, under the harmless-error and plain-error doctrines, the court's

failure to provide notice did not warrant reversal of any of petitioners' sentence. *Id.* at 13-14, 18-21.

The court of appeals affirmed all of the sentences. Pet. App. 1a-18a. At the outset, the court noted that petitioners Pantoja-Arellano and Cruz-Martinez had made timely objections to the lack of notice, *id.* at 10a; assumed for the sake of argument that petitioner Dehuma-Suarez's post-sentencing pleading sufficed as a contemporaneous objection, *id.* at 10a-11a & n.17; observed that petitioners Mejia-Huerta and Craddock had not objected, *id.* at 4a, 9a, 11a; and concluded that petitioner Estrada's statement that he would "file a written objection on the notice requirement" did not suffice to preserve the issue, because he failed to file such a pleading. *Id.* at 11a & n.22. Accordingly, the court determined that Pantoja-Arellano's, Dehuma-Suarez's, and Cruz-Martinez's lack-of-notice claims should be reviewed for harmless error, whereas Mejia-Huerta's, Estrada's, and Craddock's lack-of-notice claims should be reviewed for plain error. *Id.* at 10a-11a.

The court of appeals then concluded that the district court had not committed error of any kind in failing to give the parties notice of its intention to vary *sua sponte* from the advisory Guidelines ranges. Pet. App. 12a-16a. The court of appeals first noted that Federal Rule of Criminal Procedure 32(h) states that, before a sentencing court "may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure." Pet. App. 3a n.3 (quoting the rule); see *id.* at 12a, 15a. The court further observed that Rule 32(h) is a codification of this Court's decision in *Burns*, which had likewise

required advance notice of *sua sponte* Guidelines departures in order to ensure focused adversarial testing of sentencing issues. *Id.* at 12a. The court of appeals emphasized, however, that the "non-Guidelines" sentence imposed on each of the petitioners was a "variance" based on the district court's consideration of the sentencing criteria set forth in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004), not a "departure" pursuant to Chapter 5 of Part K of the Guidelines. Pet. App. 15a-16a.

The court of appeals noted that other circuits have disagreed on whether Rule 32's notice requirement applies to Section 3553(a) variances. Pet. App. 14a-15a. The court aligned itself with those courts of appeals that have held that the notice requirement applies only to departures and does not apply to variances:

> [T]he plain language of Rule 32(h) limits its application to *departures*. It contains no language even hinting that it might apply elsewhere. * * * In addition, as [*United States* v.] *Booker*[, 543 U.S. 220 (2005),] has rendered the Guidelines purely advisory, the concerns that precipitated [the notice requirement] are no longer viable. Sentencing post-*Booker* is a heavily discretionary exercise. Sentencing courts need only consider the Guidelines as informative and must consult the full host of factors set forth in § 3553(a) before rendering a reasonable non-Guidelines sentence. These factors are known (or knowable) by the parties prior to sentencing, thus putting the litigants on notice that a sentencing court has discretion to consider any of these factors. This knowledge eliminates the element of unfair surprise, the concern that defense counsel will waste time with a pre-sentencing filing, the possibility that defense counsel will unwittingly provide the sentencing court

> with a grounds for departure, and the worry of possibly undermining the adversarial process[.]

Id. at 15a. Accordingly, the court of appeals affirmed petitioners' sentences.[1]

ARGUMENT

Petitioners (Pet. 14-30) seek review of whether Rule 32(h) requires a district court to provide notice of its intent to impose a sentence outside the applicable advisory Sentencing Guidelines range based on the criteria set forth in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004) when the grounds for the non-Guidelines sentence are not identified in the presentence report or the parties' prehearing submissions. Although there is a conflict among the courts of appeals on that question, this Court's review is not warranted at this time, for three reasons. First, the Court's resolution of the issue would not affect the outcome in this case. Second, the Judicial Conference is studying the possibility of amending Rule 32 to provide clarification on the notice issue. Third, the Court should not address the notice issue until after its decision in *Gall* v. *United States*, cert. granted, No. 06-7949 (June 11, 2007), because the decision in that case may shed light on the correct resolution of the issue and may thus lead the courts of appeals to alter or to refine their conclusions about the scope of Rule 32.

1. a. In *Burns* v. *United States*, 501 U.S. 129 (1991), this Court construed a prior version of Rule 32 to require a sentencing court to give notice to the parties before departing *sua sponte* from the applicable Guidelines range. 501 U.S. at 135-139; see *id.* at 135 n.4 (stat-

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[1] The court of appeals also rejected other contentions that petitioners have not renewed in this Court. Pet. App. 16a-18a.

ing that the notice requirement applies to both upward and downward departures). The Court acknowledged that the rule contained no "express language" requiring advance notice of *sua sponte* departures. *Id.* at 132; see *id.* at 136. The Court concluded, however, that notice was implicitly required by the rule's mandate that the parties have "an opportunity to comment upon the probation officer's determination [in the presentence report] and on other matters relating to the appropriate sentence." *Id.* at 135 (quoting Fed. R. Crim. P. 32(a)(1) (1990)). The Court reasoned that whether a *sua sponte* departure from the Guidelines is warranted is "[o]bviously * * * a 'matte[r] relating to the appropriate sentence,'" and "it makes no sense to impute to Congress an intent that a defendant have the right *to comment* on the appropriateness of a *sua sponte* departure but not the right *to be notified* that the court is contemplating such a ruling." *Id.* at 135-136 (quoting Fed. R. Crim. P. 32(a)(1) (1990)).

The Court also reasoned that reading Rule 32 to dispense with notice would be inconsistent with the rule's "purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences." *Burns*, 501 U.S. at 137. Finally, the Court relied on the doctrine of constitutional avoidance, noting that, if Rule 32 were "read * * * to dispense with notice, [the Court] would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause." *Id.* at 138.

In 2002, Rule 32 was amended by the addition of a new subsection that expressly codified the Court's holding in *Burns*. That subsection provides that the district court, before it "depart[s] from the applicable sentencing range on a ground not identified for departure either

in the presentence report or in a party's prehearing submission, * * * must give the parties reasonable notice" of "any ground on which the court is contemplating a departure." Fed. R. Crim. P. 32(h). At the same time, the language on which the Court relied in *Burns* was retained and designated as Rule 32(i)(1)(C). See Fed. R. Crim. P. 32(i)(1)(C) (stating that the sentencing court "must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence").

b. This Court subsequently decided *United States* v. *Booker*, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory rather than mandatory. Since *Booker*, courts have considered whether Rule 32's notice requirement applies not only to a departure under the Guidelines but also to a decision by a sentencing court to exercise its post-*Booker* discretion to impose a non-Guidelines sentence based on the criteria in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). In the government's view, Rule 32's notice requirement applies to such a decision.

Although Rule 32(h) refers only to "departures," Fed. R. Crim. P. 32(h), Rule 32 elsewhere continues to mandate that the district court allow the parties "to comment on * * * matters relating to an appropriate sentence," Fed. R. Crim. P. 32(i)(1)(C). As described above, this Court concluded in *Burns* that the mandate that the parties be allowed to comment on sentencing matters requires that they receive notice of *sua sponte* departures. The same reasoning that led this Court to that conclusion also indicates that notice is required before a sentencing court may impose a non-Guidelines sentence based on the criteria in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). Just like a departure, a decision to

impose a non-Guidelines sentence under Section 3553(a) is "[o]bviously" a "matte[r] relating to the appropriate sentence," and "it makes no sense to impute to Congress an intent that a defendant have the right *to comment* on the appropriateness of [that decision] but not the right *to be notified* that the court is contemplating such a ruling." *Burns*, 501 U.S. at 135-136.

The other reasons for the notice requirement recognized in *Burns* also support the conclusion that the requirement extends to notice that the sentencing court is contemplating a non-Guidelines sentence under Section 3553(a). By construing Rule 32 to require notice before imposition of non-Guidelines sentences under Section 3553(a), courts avoid the constitutional issue of whether notice is required by due process. See *Burns*, 501 U.S. at 138. In addition, notice promotes Rule 32's goal of "full adversary testing of the issues relevant" to sentencing. *Id.* at 135. Even under the post-*Booker* advisory Guidelines system, determination of the Guidelines range remains the "starting point for constructing a defendant's sentence." *United States* v. *Dixon*, 449 F.3d 194, 204 (1st Cir. 2006).[2] Although the parties know that the sentencing court will consider the Section 3553(a) factors and may impose a sentence outside the Guidelines range based on those factors, "application of those factors turns on relevant facts, some of which might be in the [c]ourt's mind but not previously disclosed." *United States* v. *Anati*, 457 F.3d 233, 237 (2d Cir. 2006). If the presentence report and the parties' submissions

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[2] See *United States* v. *Anati*, 457 F.3d 233, 236-237 (2d Cir. 2006); *United States* v. *Jointer*, 457 F.3d 682, 686 (7th Cir. 2006), petition for cert. pending, No. 06-7600 (filed Oct. 27, 2006); *United States* v. *Cantrell*, 433 F.3d 1269, 1280 (9th Cir. 2006); *United States* v. *Terrell*, 445 F.3d 1261, 1264 (10th Cir. 2006).

have not discussed the matter, the parties need notice of the grounds on which the court is considering imposing a non-Guidelines sentence in order to ensure the full airing of the issues that will determine the sentence. *Ibid.*; *United States* v. *Evans-Martinez*, 448 F.3d 1163, 1167 (9th Cir. 2006).

This Court's recent decision in *Rita* v. *United States*, No. 06-5754, 2007 WL 1772146 (June 21, 2007), also suggests that a district court must give the parties notice that it is contemplating a non-Guidelines sentence. The Court in *Rita* noted that the Guidelines still generally provide the framework for the sentencing process. The Court explained that the district court will normally begin the process "by considering the presentence report and its interpretation of the Guidelines." *Id.* at *9 (citing 18 U.S.C. 3552(a) and Rule 32). The sentencing court will then consider arguments for a departure (where the case "falls outside the 'heartland' to which the Commission intends individual Guidelines to apply") or for a variance "because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless." *Ibid.* The Court emphasized that, regardless of the ultimate sentence imposed, the sentencing court must conduct "the thorough adversarial testing contemplated by federal sentencing procedure." *Ibid.* In making that point, the Court cited Rule 32(h) and (i)(1)(C), as well as *Burns*, for the "importance of notice and meaningful opportunity to be heard at sentencing." *Ibid.*

2. As petitioners observe (Pet. 16-26), the courts of appeals have reached differing conclusions on whether notice is required before a court may impose a non-Guidelines sentence based on the criteria in Section

3553(a). The Second, Fourth, Sixth, Ninth, and Tenth Circuits have held that notice is required. See *Anati*, 457 F.3d at 235-237; *United States* v. *Davenport*, 445 F.3d 366, 371 (4th Cir. 2006); *United States* v. *Cousins*, 469 F.3d 572, 579-580 (6th Cir. 2006); *Evans-Martinez*, 448 F.3d at 1166-1167; *United States* v. *Atencio*, 476 F.3d 1099, 1103-1105 (10th Cir. 2007). The Third, Fifth, Seventh, Eighth, and Eleventh Circuits have held to the contrary. See *United States* v. *Vampire Nation*, 451 F.3d 189, 195-196 (3d Cir.), cert. denied, 127 S. Ct. 424 (2006); Pet. App. 14a-16a; *United States* v. *Walker*, 447 F.3d 999, 1006 (7th Cir.), cert. denied, 127 S. Ct. 314 (2006); *United States* v. *Long Soldier*, 431 F.3d 1120, 1122 (8th Cir. 2005); *United States* v. *Irizarry*, 458 F.3d 1208, 1211-1212 (11th Cir. 2006), petition for cert. pending, No. 06-7517 (filed Oct. 26, 2006).

Despite the conflict among the courts of appeals, this Court's review is not warranted in this case. As the court of appeals noted, petitioners Mejia-Huerta, Estrada, and Craddock failed to preserve their notice claims in the district court. Pet. App. 11a.[3] Accordingly, they would be entitled to relief only if they could show plain error that affected their substantial rights, and

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[3] Petitioner Estrada suggests (Pet. 11 & n.4) that he preserved his notice claim by lodging a "verbal pro forma objection" at his sentencing hearing. The court of appeals concluded otherwise (Pet. App. 11a & n.22), and that fact-bound conclusion does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). In any event, as the court of appeals correctly observed (Pet. App. 11a n.22), Estrada's statement that he would "file a written objection on the notice requirement" provided neither sufficient detail on the substance of the objection nor an opportunity for the district court to cure the alleged error or to make clear that any error had not affected Estrada's sentence.

only if the error seriously affected the fairness, integrity or public reputation of the sentencing proceedings. *United States* v. *Olano*, 507 U.S. 725, 732 (1993). They cannot make that showing, because a sentencing court's failure to provide notice that it is contemplating a Section 3553(a) variance is not a plain or obvious error. See, *e.g.*, *United States* v. *Gentry*, 214 Fed. Appx. 403, 405 (5th Cir. 2007); *United States* v. *Dean*, 202 Fed. Appx. 775, 777 (5th Cir. 2006); *United States* v. *Mateo*, 179 Fed. Appx. 64, 65 (1st Cir. 2007); see generally, *e.g.*, *United States* v. *Williams*, 469 F.3d 963, 966 (11th Cir. 2006) (no plain error where there is no controlling case law and the circuits are divided); *United States* v. *Teague*, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 127 S. Ct. 247 (2006). Similarly, there can be no doubt that a favorable ruling from this Court on the notice issue would have no effect on the sentences of petitioners Pantoja-Arellano, Dehuma-Suarez, and Cruz-Martinez. The district court explicitly stated that it would impose the "same sentence" on each of those petitioners even if it "were to vacate its prior sentence and formally notify the parties in writing that the sentence imposed may be outside of the guideline range." Pet. App. 23a, 40a; see *id.* at 31a. Although petitioners make a conclusory assertion that, with sufficient notice, they "could have introduced evidence to rebut the district court's assertions that all of [petitioners] were dangerous and lacked respect for the laws of the United States and could have addressed whether the criminal history scores from the Guidelines were non-representative" (Pet. 27), petitioners have made no proffer of any evidence that counsel would have provided. Because the outcome of this case would have been the same under any view of Rule 32, further review is unwarranted.

Further review would also be inappropriate because the Judicial Conference is studying the possibility of amending Rule 32 to provide clarification on the notice issue. The Conference's Committee on Rules of Practice and Procedure recently circulated for public comment a proposal to amend Rule 32(h) to require a sentencing court to provide notice to the parties of any ground for imposing a non-Guidelines sentence not previously identified in the presentence report or by the parties themselves. "After discussion at the Standing Committee of recent decisions taking various approaches to the question whether notice must be given, the proposed amendment to subdivision (h) was withdrawn to permit further study." See Committee on Rules of Practice & Procedure, Judicial Conference, *Report of the Judicial Conference* Rules App. at H-3 (Sept. 2006). If, after that further study, the Conference decides to clarify the rule, this Court's intervention would be unnecessary. Petitioners suggest (Pet. 29-30 & n.8) that review is warranted now because any amendment to the rule would not go into effect until at least 2010. But, even assuming petitioners' calculations are correct, the fundamental point remains the same. Any decision by this Court on the scope of Rule 32 would have limited long-term effect in the event of a rule change.

Finally, review would be premature at this juncture because a case currently pending before the Court may shed light on the proper resolution of the notice issue and may thus lead the courts of appeals to alter or to refine their conclusions about the scope of Rule 32. The Court has granted a writ of certiorari in *Gall* v. *United States*, No. 06-7949 (June 11, 2007), to address the standard of review that courts of appeals should apply in assessing the reasonableness of out-of-Guidelines sen-

tences. The decision in *Gall* is likely to provide additional clarification on the role of the Sentencing Guidelines in the post-*Booker* sentencing regime. The decision may therefore provide the lower courts with insight into the importance of notice in achieving Rule 32's goal of full adversary testing of the issues relevant to sentencing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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